Short Line, 225 U. S. 142, the decision in the *Jones Case* rested not upon the ground that the work of construction had reached the absolutely completed stage so as to enable the road to be operated, but on the fact that the work was of such a character as to manifest that the railroad company had exercised its judgment as to where its line was to be established and had done such work of construction as "necessarily fixes the position of the route and consummates the purpose for which the grant of a right of way is given" (p. 150). And it is obvious that this standard when complied with would serve not only to demonstrate the fixed intention of the railroad to appropriate, but also to give tangible and indubitable evidence to others of the right of way appropriated, thus preventing injury to innocent persons which might result from their selection of land in ignorance of the fact of its prior appropriation. The distinction between the doctrine of the *Jones Case* and that of the *Doughty Case* is therefore that which necessarily must obtain between permanent work of construction of a railroad on a line definitely selected and fixed by it, and mere tentative work of surveying done by a railroad for the purpose of enabling the line which it was proposed to construct to be ultimately selected. The broad distinction between this case and the *Doughty Case* both as to the fundamental rights given by the statute and the protection to innocent parties was thus lucidly pointed out by the court below in its opinion:

"There can be no doubt, indeed, that the route was fixed, both on account of the physical construction and the difficulty of a subsequent removal, ... The entryman in this case can have no more ground for complaint than could the entryman in the case of *Stalker* v. *Oregon Short Line*, *supra*. It would be absurd to hold that one who enters upon land and sees upon it a railroad grade which is only 18 days from physical completion, and, as we have a right to believe, but a link in miles of

road stretching across the same prairie, was not aware of this prior railroad occupation."

We have not stopped to consider an intimation contained in the argument that the court erred in its finding of fact as to the state of construction of the road at the time the entry by Barlow was made, because without at all questioning our power to review the facts in so far as necessary to dispose of the Federal contention, we consider the suggestion wholly without merit, first, because we would not in any event disregard the finding of fact of the court below except upon conviction of clear error committed, for which the record here affords no ground whatever; and second, because as the finding of the court below was also the finding of the trial court, the request invites us to disregard the findings of both courts on a matter of fact in the absence of any ground for a conviction that error of fact was clearly committed.

Affirmed.